

NOTE CONCERNING GENERAL ORDER 2-39, SUSPECT LINEUP PROCEDURE

The Department is indebted to the Virginia State Crime Commission for their valuable and dedicated work in researching and drafting the following Sample Directive. Additionally, DCJS would like to acknowledge the contribution of research and policy development done by the Virginia Beach, Virginia Police Department, as well as their willingness to share details of their written policy, Number 10.08, entitled Eyewitness Identification Procedures, effective on 11/15/02.

Reproduced here is House Document No. 40 from Publication Year 2005, which provides additional historical perspective and insight on this Sample Directive. This document is available on the official website of the Virginia General Assembly (<http://leg2.state.va.us/dls/h&sdocs.nsf/Published+by+Year?OpenForm&StartKey=2005&ExpandView>).

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Document Title

Report on Mistaken Eyewitness Identification

Author

Virginia State Crime Commission

Enabling Authority

HJR 79 (2004)

Executive Summary

During the 2004 Session of the Virginia General Assembly, Delegate Harry R. Purkey introduced House Joint Resolution 79 (HJR 79) House Joint Resolution 79 (2004). See Attachment 1., directing the Virginia State Crime Commission to study mistaken identification in criminal cases. Specifically, the resolution directs the commission to: (i) review the cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime; (ii) examine the procedures used in traditional police lineups or photographic review; and, (iii) consider the sequential method as a procedure for identifying suspects. As a result of the study effort, the staff made recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia. These recommendations, as follows, were approved by the Virginia State Crime Commission:

Recommendations:

Recommendation 1: Amend the Code of Virginia to require local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups.

Recommendation 2: Request the Department of Criminal Justice Services (DCJS), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

Recommendation 3: Request DCJS, through regulation, to amend the entry level and in-service training academy requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

Recommendation 4: Request DCJS to work with the Virginia Law Enforcement Professional

Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies.

Recommendation 5: Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriffs' Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits of the sequential method of lineups; presentation to each association's annual meetings will occur.

Recommendation 6: Amend the Code of Virginia to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as a repository for all mug shots and queries for photographic lineups.

POLICE/SHERIFF'S DEPARTMENT GENERAL ORDERS	
SUBJECT: Suspect Lineup Procedure	NUMBER: 2-39
EFFECTIVE DATE: July 1, 2005	REVIEW DATE: (annually)
AMENDS/SUPERSEDES: New	APPROVED: _____ Chief of Police/Sheriff
VLEPSC STANDARDS:	

NOTE

This order is for internal use only and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial setting.

INDEX WORDS

Eyewitness Evidence: A Guide for Law Enforcement

eyewitness identification

fillers (non suspects)

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I. POLICY

The Department attaches the highest priority to the protection of the citizens that we serve. Recognizing that innocent persons may occasionally get caught up in the criminal investigative process and be wrongly implicated in criminal matters, we attach equal importance to clearing innocent persons as that attached to arresting the guilty.

According to a 1999 National Institute of Justice report, over 75,000 people a year become criminal defendants based on eyewitness identification.¹ Research of cases in

¹ "Mistaken Eyewitness Identification: The Problem." Available at

which DNA evidence has been used to exonerate individuals previously convicted of crimes, leads many experts to conclude that improved, more reliable methods of handling eyewitness identifications may promote higher standards of justice. For example, of the 151 DNA exoneration cases studied, nationally², in 61 of the first 70, mistaken eyewitness identification was a factor leading to the conviction; and, in 45 of the first 82 DNA exoneration cases, a photographic lineup was the type of pre-trial identification procedure used.³

Recognizing that the traditional system for conducting eyewitness identification procedures is not infallible and that the procedures did not incorporate the growing body of psychological study of eyewitness memory and behavior, the United States Department of Justice (DOJ) developed guidelines for conducting these procedures. The purpose of the guidelines is to prevent eyewitness error rather than correcting errors after they have occurred. The guidelines take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results.

The following procedures incorporate the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence: A Guide for Law Enforcement*. An identification obtained through a lineup composed in this manner should minimize the risk of misidentification and have stronger evidentiary value than one obtained without these procedures. Specifically, use of these procedures should maximize the reliability of identifications, minimize unjust accusations of innocent persons and establish evidence that is reliable and conforms with established legal procedure.

II. PURPOSE

To establish a policy for the preparation and presentation of photographic and in-person lineups.

III. DEFINITIONS

A. Lineup

A lineup is any procedure in which a witness to a crime or other incident is asked to identify one or more suspects from among a group of persons in order to determine or confirm the identity of the suspect(s). Such procedures involve either actually viewing of persons or viewing of photographs.

B. Photo Lineup

<http://www.innocenceproject.org/causes/mistakenid.php>.

² Id.

³ Id.

A photo lineup is any lineup procedure in which photographs are used instead of live persons. These procedures are often used when a suspect has not been identified or when such person has not been located or arrested.

C. Sequential Lineup

A sequential lineup is a particular method of conducting a suspect lineup in which persons or photographs are presented to the witness one at a time, rather than in any sort of grouping.

IV. PROCEDURES - General responsibilities

- A. Department personnel shall strictly adhere to established procedures for conducting suspect lineups in order to avoid the possibility of error or of undue suggestiveness to witnesses.
- B. Department personnel shall be trained in lineup procedures to establish uniformity and consistency of such procedures and to establish a high level of competence in carrying out this important aspect of a criminal investigation.
- C. Department personnel shall report any known errors, flaws or non-conformance with established procedures in the conduct of a suspect lineup that they may observe or become aware of to their supervisor in order that corrective actions may be taken and safeguards established to protect the innocent.
- D. The Department will confer with the Office of the Commonwealth's Attorney in establishing lineup procedures in order to assure the best use of this type of evidence and to assure that procedures established are compatible with the prosecution of criminal cases. Likewise, instructions given to witnesses during a lineup procedure will be those established and approved in consultation with the Commonwealth's Attorney.

V. PROCEDURES - Composing the Lineup

- A. The investigator in charge should select an individual who does not know which member of the lineup is the "true" suspect to conduct any lineups in order to avoid inadvertent signs or body language that may lead or cause a witness to make an incorrect identification. The officer/investigator selected should be thoroughly familiar with this procedure.
- B. Assure that law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.

- C. Ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.
- D. Avoid mixing color and black and white photos. Photos should be either all black and white or all color.
- E. Cover any portions of mugshots or other photographs that provide identifying information. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness. If it is necessary to block-out or cover a notation, such as a name on one photo, then similar blocking-out or covering marks should be placed on all photos so that they will appear alike.
- F. Use photos of the same size and basic composition, and never mix mugshots with other snapshots or include more than one photo of the same suspect.
- G. Include only one suspect in each identification procedure.
- H. Select fillers (non suspects) who generally fit the witnesses' description of the offender. When there is a limited or inadequate description of the offender provided by the witness, or when the description of the offender differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
- I. Select a photo that resembles the suspect's description or appearance at the time of the incident, if multiple photos of the suspect are reasonably available to the investigator.
- J. Ensure that the photos are reasonably contemporary.
- K. Include a minimum of five fillers (non-suspects) per identification procedure.
- L. Create a consistent appearance between the suspect and fillers so that the photos depict individuals who are reasonably similar in age, height, weight and general appearance, and are of the same sex and race. However, avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
- M. Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature – such as a scar or tattoo - used to describe the perpetrator by artificially adding or concealing that feature.
- N. Place the suspect in different positions in each lineup when conducting more than one lineup for a case with multiple witnesses or suspects.
- O. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.
- P. Review the array, once completed, to ensure that the suspect does not unduly stand out.
- Q. Assign each photo/person a lineup identification number. Record the identification number on the back of each photo. Refer to that photo/person only by that number. The nature of the identification number should be purposely complex to the witness, so that any inadvertent glance should not significantly hinder the identification process or alert the witness as to the identity of the actual suspect.

[Note: Some departments use the assigned case number and simply add a series of numbers and or letters at the beginning, end or in the middle of the case number. For example, with a case number such as 2005 – 12345, one could create ID numbers like A 2005 – 12345, or 2005 – 12345 B, or 2005 – C – 12345.]

- R. After each photo/person has been assigned an identification number, record the number along with all other pertinent information on the Lineup Identification Form.
- S. Record the presentation order of each lineup and ensure that a complete written record of the proceeding is made and retained. In addition, the photos themselves should be preserved in their original condition. For live lineups, a group photo should be taken of all persons in the lineup together to illustrate size differences among the lineup participants. This photo must not be shown to the witness, but will be included with the completed case file.
- T. Remember that a defendant who has been charged with a crime has a constitutional right to counsel for all proceedings that involve the defendant personally which follow that status.
- U. Photo lineups need not consider right to counsel issues as they do not involve the defendant personally.
- V. Advise the accused that he may take any position in the live lineup that he prefers and may change positions prior to summoning a new witness.
- W. Ensure that witnesses are not permitted to see nor are they shown any photographs of the accused immediately prior to the lineup.
- X. Ensure that not more than one witness views each lineup at a time and that they are not permitted to speak with one another during line up proceedings.

VI. PROCEDURES - Conducting the Identification Procedure

- A. The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or non-identification decisions.
- B. Assure that all law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.
- C. When presenting the lineup, the person administering the lineup should use the approved standard instructions for witnesses prior to the lineup that the offender might or might not be among those in the photo array or live lineup, and therefore, the witness should not feel compelled to make an identification.
- D. Assure the witness prior to the lineup that regardless of whether an identification is made, the police will continue to investigate the incident.
- E. Instruct the witness that if the offender is seen in the lineup, he/she might not appear exactly the same as on the date of the incident because features such as clothing, head or facial hair can change. Additionally, photos do not always depict the true complexion of a person, which might be lighter or darker than shown in the photo. Be careful not to imply or lead the witness to believe that the suspect's appearance has actually changed in any way.

[Note: For example, saying to a witness that "The suspect's appearance could be different, for example if he has since gotten a tattoo", may imply to the witness that the police know the suspect got a tattoo. If uncertain about

identity, this could lead the witness to pick out someone in the line-up with a tattoo simply for that reason.]

- F. Provide the following additional viewing instructions to the witness:
 - a. Individual photos/persons will be viewed one at a time.
 - b. Photos/persons are in random order.
 - c. Take as much time as needed in making a decision about each photo/person.
 - d. All photos will be shown, even if an identification is made prior to viewing all photos.
- G. Confirm that the witness understands the nature of the sequential procedure.
- H. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.
- I. Present each photo to the witness separately, in a previously determined order, as documented on the lineup worksheet, removing those previously shown.
- J. Care should be taken to avoid the witness turning over the photo and reading the identification number recorded on the back.
- K. Avoid saying anything to the witness that may influence the witness' selection.
- L. If an identification is made, avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including all required signatures and paperwork) has been completed.
- M. If the witness requests to view the photo/person sequence again, (or specific photos/persons again), they may be shown a second time, but must be shown again in the same sequence in its entirety even if the witness makes an identification during this second showing.
- N. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

VII. PROCEDURES - Recording Identification Results

- A. When conducting an identification procedure, the person administering the lineup shall preserve the outcome of the procedure by documenting any identification or non-identification results obtained from the witness. A complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings.
- B. When documenting the identification procedure, the person administering the lineup should record both identification and non-identification results, including the witness' own words.
- C. Document in writing the photo lineup procedures, including identification information and sources of all photos used, names of all persons present at the lineup, and date and time of the identification procedure.
- D. Ensure that the results are signed and dated by the witness and the person administering the lineup.
- E. Ensure that no materials indicating previous identification results are visible to the witness.
- F. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

